TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 773.

CHARLES M. BLAKE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 8, 1880.

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1 United States Court of Claims, December term, A. D. 1877.

CHARLES M. BLAKE, CHAPLAIN, UNITED States Army,
vs.
THE UNITED STATES. } No. 11779.

I.—Original petition.—Petition filed Sept. 17, 1877.—*J. R.*

The plaintiff complains of the defendants and alleges the following facts constituting his cause of action:

That in September, 1864, being a regularly ordained minister of the Presbyterian denomination, he was duly appointed and commissioned hospital chaplain, and afterwards, in May, 1866, he was appointed as post chaplain, to take rank as captain of infantry, with the pay and emolument of fifteen hundred dollars a year, entitled to draw the forage of two horses, with quarters and fuel furnished him at the posts where assigned to duty, and to occupy the same footing as to tenure of office, retirement, allowance for service, and pensions as now provided by law for other officers of the Army; that soon after the last said appointment he was transferred to Prescott, in the Territory of Arizona, and thence, in August, 1867, he was ordered to Camp McDowell, in the same Territory, in connection with the 32d Infantry, United States Army, commanded at that time by Captain and Brevet Major William H. Mills, at said post.

2. That prior to his appointment as chaplain, in September, 1864, he had been commissioned as senior captain and was the acting major of the 3d Regiment, U. S. Colored Infantry, and while serving as such in the line of his duty he was wounded in the head by a shell, from
2 which he has ever since more or less suffered, and was mustered out of that branch of the military service in August, 1864, for and on account of physical disability.

3. That soon after entering upon his official duties as chaplain at Camp McDowell he became seriously ill, and greatly at cross purposes with some of the officers of the Army, resulting, as now believed, but not then fully understood, from a "lesion" of the brain, produced by the bursting of the shell aforesaid, and culminating in a final overthrow of his reason, and in this disturbed and irresponsible condition of his mind, on the 24th day of December, 1868, he addressed a communication to the Secretary of War in which he tendered his resignation as chaplain in the Army, unless certain grievances referred to in said communication could be remedied. On the 17th of March, following, his resignation was accepted by the Secretary of War. Afterwards, recovering from his mental derangement, he was made aware by his friends that he had sent a resignation of his chaplaincy to the Secretary of War, and, thereupon, on the 27th of March, 1869, he sent the following telegram to the Hon. R. C. McCormick, then a Delegate in Congress, namely:

"Sick, resignation not intended. If so construed withdraw immediately.

(Signed) "CHARLES M. BLAKE.
"*Post Chaplain, U. S. A.*"

Which was duly laid before the Secretary of War resulting in no action. Ascertaining that the supposed resignation had been accepted

before said telegram had reached Washington, the plaintiff, treating the same as a nullity and void in law, by reason of the above facts, addressed a letter dated May 31st, 1869, to the Secretary of War requesting an order to be made restoring him to duty, and that his back pay be allowed him, which was refused, and he was notified that his account was
3 finally closed. At the 44th Congress a bill was introduced in the Senate by Senator Cameron for his relief, but that no action was taken thereon.

4. The plaintiff now alledges that before, at the date and subsequent thereto of the letter addressed to the Secretary of War above referred to, tendering a conditional resignation of the office of post-chaplain, he was insane in a sense that made him irresponsible for his acts; that said supposed resignation for that reason was void and inoperative, and did not have the effect to vacate his office; that he has not been otherwise dismissed or discharged from his office as post-chaplain before or since that time, and has been ready and willing at all times since his recovery, in March, 1869, to enter upon and discharge the duties thereof; that the government has steadily refused to assign him to any post of duty or to give him the pay and emoluments which by law he is entitled to receive, although he has repeatedly presented and demanded the same; that there is now due him and unpaid eight years and five months and a half pay—dating from the last payment, on the 38th April, 1869—at the rate of fifteen hundred dollars per year, being the salary fixed by law for post-chaplains (§§ 1261, 1094, 1121, 1122, Revised Statutes), exclusive of the forage for two horses, making in the aggregate the sum of $12,562.50, to which he is justly entitled from the United States, after allowing all just credits and set-offs; that no assignment of said claim, or any part thereof, has been made, and he has at all times borne true allegiance to the government of the United States, and as a citizen thereof has not in any way voluntarily aided, abetted or given encouragement to rebellion against said government, and for the amount of the sum aforesaid, with interest and costs, he asks judgment, and if entitled to commutation for the forage of two horses, then he asks judgment also for that, or what the same shall be proved to be worth.

R. P. LOWE,
Attorney for Plaintiff.

4 R. P. Lowe, holding a power of attorney from the plaintiff, herewith filed, states upon oath that he has reason to believe and does believe, from evidence and documents in his possession, that the facts set forth in the foregoing petition are true.

R. P. LOWE.

Sworn to and subscribed before me this 17th day of September, 1877.

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

Address of plaintiff, "Napa, California."
Address of Counsel, "No. 23 First street, N. E., Washington, D. C."

The United States in account with Charles M. Blake, Chaplain U. S. A.

Sept. 15th, 1877.

For the pay and emoluments to which he is entitled by law, per annum, from the 28th of April, 1869, the date of the last payment, to the 15th of September, 1877, at $1,500 per annum, amounting in the aggregate to..... $12,562 50

Interest	
Commutation of the forage of two horses for the same time, at $100 each per annum, amounting to	1,634 25
Total	$14,196 75

5 II.—*Traverse.—Filed Oct.* 9, 1877.—*J. R.*

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of fourteen thousand one hundred and ninety-six dollars and seventy-five cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

6 III.—*Plea.*

Now come the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain his suit against the defendants for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

THOMAS SIMONS,
Assistant Attorney-General.

Filed Oct. 9, 1877.—J. R.

7 IV.—*Plea.*

Now come the defendants, by their attorney-general, and say that the claimant herein should not further have or maintain his suit against the defendants for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

THOMAS SIMONS,
Assistant Attorney-General.

Filed Aug. 22, 1878.—J. R.

8 V.—*Replication.*

Now comes the plaintiff, by his attorney, R. P. Lowe, and says as to the first defence set up by the defendants he joins issue thereon.

Second. In reply to the statutes of limitation 2ndly pleaded by the defendants, the plaintiff says that his cause of action consists of back

pay as chaplain in the United States Army, running from the 28th day of April, 1869, to the 15th of Sept. 1877; that the same is one and indivisible continuously accruing up to the commencement of the
9 suit, and against which the statute did not run; that for three or four years after his cause of action had commenced accruing the plaintiff was insane and incapable in law of instituting a suit for the same, during which time the operation of the statute was suspended, and on the other hand plaintiff avers that he did bring this his suit to recover the claim he now sets up within six years after he had recovered his reason and right mind and capable in law of asserting his rights in a court of justice, wherefore he prays judgment.

R. P. LOWE,
For Pl'ff.

Filed Sep. 13, 1878.—J. R.

10 VI.—*Motion.*

Dec. term, 1877. No. 11779.

To the honorable court or a member thereof:

The plaintiff in the above-entitled cause asks for permission to file an amended petition therein.

Filed Oct. 26, 1878.

J. R.

Allowed.

W. A. R., *Judge.*

11 VII.—*Amended petition.*

Amended petition filed October 26, 1878.

J. R.

The plaintiff complains and alleges the following facts constituting his cause of action against the defendants.

That on the 13th day of August, 1861, being a regularly-ordained minister of the Presbyterian denomination of Christians, he was duly appointed and commissioned as chaplain in the volunteer service in the State of Missouri; that afterwards he was commissioned captain of one of the companies in the 3d Regiment United States Colored Infantry, in which he served as such till August, 1864, when he was duly appointed hospital chaplain, in which capacity he continued to act until May, 1866, when he was appointed post chaplain, to take rank as captain of infantry, with the pay and emolument of fifteen hundred dollars a year, entitled to draw the forage of two horses, with quarters and fuel furnished him at the posts where assigned to duty, and to occupy the same footing as to tenure of office, retirement, allowance for service and pensions as now provided by law for other officers of the Army; that soon after the last said appointment, he was transferred to Prescott, in the Territory of Arizona, and then, in August, 1867, he was ordered to Camp Mc-
12 Dowell, in the same Territory, in connection with the 32d Infantry of the United States Army, commanded at that time by Captain and Brevet Major William H. Mills, at said post.

2d. That while in the line of his duty, commanding the colored troops aforesaid as senior captain and acting major at Fort Wagner, Morris Island, South Carolina, on or about the 30th of August, 1863, he was in-

jured in his head by the explosion of a shell passing near him, from which he has ever since suffered more or less, and was mustered out of that branch of the military service in August, 1864, and was again reappointed hospital chaplain as aforesaid.

3d. That soon after entering upon his official duties as chaplain at Camp McDowell, he became seriously ill, and greatly at cross purposes with some of the officers of the Army, resulting, as now believed, but then not fully understood, from a "lesion" of the brain, produced by the bursting of the shell aforesaid, and culminating in a final overthrow of his reason; and in this disturbed and irresponsible condition of his mind, on the 24th day of December, 1868, he addressed a communication to the Secretary of War, in which he conditionally offered his resignation as chaplain in the Army unless certain grievances referred to in said communication could be remedied. On the 17th of March this communication was construed as a resignation, and as such was accepted by the Secretary of War. Afterwards, partially recovering from his mental derangement, he was made aware by his friends that he had sent what might be considered a resignation of his chaplaincy to the Secretary of War, and thereupon, on the 27th of March, 1869, he sent the following telegram to the Hon. R. C. McCormick, then a Delegate in Congress, viz:

"Sick. Resignation not intended; if so construed, withdraw immediately.

(Signed) "CHARLES M. BLAKE,
"*Post Chaplain, U. S. A.*"

which was laid before the Secretary of War, resulting in no action.

13 Ascertaining that the supposed resignation had been accepted before said telegram had reached Washington, the plaintiff, treating the same as a nullity and void in law, by reason of the above facts, addressed a letter, dated May 31st, 1869, to the Secretary of War, requesting an order to be made restoring him to duty, and that his back pay be allowed him, which was refused, and he was notified that his account was finally closed. At the Forty-fourth Congress a bill was introduced in the Senate by Senator Cameron for his relief, but no action was taken thereon.

4th. The plaintiff now states that before, at the date, and subsequent thereto of the letter addressed to the Secretary of War above referred to, tendering or offering a conditional resignation of the office of post chaplain, he was insane in a sense that made him irresponsible for his acts; that said supposed resignation for that reason was void and inoperative, and did not have the effect to vacate his office; that he has not been otherwise dismissed or discharged from his office of post chaplain before or since that time, and has been ready and willing at all times since his recovery, about the 1st of the year 1874, to enter upon and discharge the duties thereof; that the government has steadily refused to assign him to any post of duty, or to give him the pay which by law he is entitled to receive, although he has repeatedly presented and demanded the same, until after the commencement of this, and within the last month, namely, on the 28th day of September, 1878, when counsel for the plaintiff in this case received the following communication from the War Department:

WAR DEPARTMENT,
WASHINGTON CITY, *September* 28, 1878.

DEAR SIR: I have the honor to inform you that the following order has been made in the case of Chaplain Blake:

EXECUTIVE MANSION,
September 28, 1878.

It appearing from the evidence, and from the reports of the
14 Surgeon-General of the Army, and the superintendent of the government hospital of the insane, that Chaplain Blake was insane at the time he tendered his resignation, it is held that said resignation was and is void, and the acceptance thereof is set aside. Chaplain Blake will be ordered to duty, and paid from the date of resignation of post chaplain—Preston Nash, to wit, May 14th, 1878, by which resignation a vacancy was created, which has not been filled. The claim of Chaplain Blake for pay from the date of his resignation to May 14th, 1878, during which his successor held the office, discharged its duties, and received pay is not decided, but is left for the decision of the court, where it is understood to be now pending.

R. B. HAYES.

GEO. W. MCCRARY,
Secretary of War.

To R. P. LOWE, *City.*

The plaintiff avers that his pay as chaplain was suspended on the 28th day of April, 1869, and renewed again, agreeably to the foregoing order, on the 14th of May, 1878, leaving his pay between these periods (being 9 years and 16 days) still due and unpaid, amounting to sixteen thousand one hundred and ninety-three dollars and seventy five cents, more or less, with the longevity rations, or ten per cent. on his current yearly pay, for each term of 5 years of service included—that is to say, having entered the military service on the 13th of August, 1861, he has continued therein ever since, making sixteen years and nine months up to the 14th of May, 1878; that as post chaplain he was entitled by law to the pay of $1,500 per year for the first five years, $1,650 for the second five years, $1,800 for the third five years, and $1,950 after fifteen years. (Rev. Stat., secs. 1261, 1121, 1122; also Scott's Digest of Military Law, secs. 321, 519.)

That he is justly entitled to the above sum, after allowing all just credits and set-offs, and exclusive of fuel and the forage of two
15 horses; that no assignments of said claim, or any part thereof, has been made, and he has at all times born' true allegiance to the Government of the United States, and as a citizen thereof has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government, and for the amount of the sum aforesaid, with interests and costs, he asks judgment, and, if entitled, to the commutation for fuel and the forage of two horses, then he asks judgment also for that, or what the same shall be proved to be worth.

R. P. LOWE,
Attorney for Plaintiff.

R. P. Lowe, holding a power of attorney from the plaintiff herewith filed, states upon oath that he has reason to believe, and does believe, from evidence and documents in his possession, that the facts set forth in the foregoing petition are true.

R. P. LOWE.

Sworn to and subscribed before me this 19th day of October, 1878.
[L. S.] A. G. HEYLMEN,
Notary Public.

Address of plaintiff, San Francisco, Cal.
Address of counsel, No. 23 First street, N. E., Washington, D. C.

MAY 15, 1878.

The United States in account with Charles M. Blake, Chaplain, U. S. A.

For the pay to which he is entitled by law as post chaplain in the Army from the 28th of April, 1869, the date of the last payment, to the 13th of August, 1871, at the expiration of the first ten years, being two years, three months, and sixteen days, at the rate of $1,650 per year $3,781 25

16 Interest thereon from the date of each quarterly payment; also, the pay from the 13th August, 1871, to the 13th August, 1876, being five years at the rate of $1,800 per year $9,000 00

Interest thereon from date of each quarterly payment; also, for the pay from the 13th of August, 1876, to the 14th of May, 1878, the date of the resumption of his payment, being one year and nine months at the rate of $1,950 per year $3,412 50

Interest thereon from the date of each quarterly payment, for commutation of fuel and quarters $1,000 00

17 VIII.—*Traverse.*

And now comes the Attorney-General, on behalf of the United States, and aswering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the said amended petition be dismissed.

And as to so much of the said amended petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

Filed Nov. 8, 1878.—J. R.

18 IX.—*Additional plea of defendants.*

The Attorney-General on behalf of the defendants, by leave of the court first had and obtained, for an additional plea comes and says that so much of the alleged claim as accrued on and before the 17th Sept., 1871, is not within the jurisdiction of the court, and the plaintiff should not further have or maintain his suit against the defendants, for the reason that neither his original nor amended petition was filed within six years after so much of sai claim first accrued nor within three years after the disability alleged in said petitions had ceased.

THOMAS SIMONS,
Assistant Attorney-General.

Allowed as of May 13, 1879.

W. A. R., *Judge.*

Filed May 13, 1879.

J. R.

19 X.—*Finding of facts.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

On the 24th of December, 1868, the claimant was a post chaplain in the Army of the United States, and was stationed at Camp McDowell, in the Territory of Arizona.

II.

For some time prior to the said 24th day of December, the claimant had been suffering from physical disease and from mental prostration, and was then so suffering. In the light of subsequent events, there can be no doubt but that he was then insane. He was at times irritable and incoherent, and manifested ego'ism and suspicion of his superiors; but it was not until after the said 24th day of December that these symptoms developed to such an extent as necessarily to induce persons who came in contact with him to believe that he was mentally incapable of acting with sound reasoning purpose.

III.

On the said 24th day of December he addressed the following letter, through the post-adjutant of the camp, to the Secretary of War:

CAMP MCDOWELL, A. T.,
Dec. 24th, 1868.

SIR: I have the honor to state that my present situation here, sick and in arrest without trial for eight weeks past, connects itself, not by analogy alone, but by direct logical sequence, with all my past military history.

It does so more especially with that of nearly four years ago in the Department of the Cumberland at Chattanooga, Tenn. And Maj. Gen. Geo. H. Thomas, U. S. A., owes it to himself, to me and family, to the military service, and to the country, to show why I was so foully and unjustly treated on that occasion. But Maj. Gen. L. Thomas, Adj't General, U. S. A., is also under similar obligation to show why it was permitted; and why he rudely reprobated in me and my commanding general, Frémont, in 1861, what he freely allowed in 1864–'65, at Chattanooga.

By necessity of the case, in striving with conscientious fidelity, at Chattanooga and in this Territory, to comply with the act of Congress approved Ap'l 9, 1864, sect. 3, I drew down upon myself the ire
20 of certain evil-doers. It was, I beg leave to say, ex necessitate rei that they conspired against me in the Department of the Cumberland as they seem to have done here in the Department of California.

For the past four years, then, in the Army, and specially since May, 1865, I have certainly fared hard. If other and more deserving chaplains have fared better, I heartily rejoice at it, but "justice" forbids that any one, of whatever grade, in the military service of the United States, should be dealt with wrongfully. The letters sent me from the "A. G. O.," dated May 2nd and June 24th, 1868, and from h'dq'rs Dep't of Cal., dated Jan., 1867, and March, 1867, and May 4th and June 22nd, 1868, do me injustice, and are wrongful. Those of May 2nd & 4th, 1868, make the act of Congress of April 9, 1864, and my "reports" in

accordance therewith, a mere nullity; and they all do me manifest injustice in other respects. That of June 24th, 1868, is in violation of law. I have, therefore, the honor to ask for the fullest and most thorough investigation. I desire to be heard from the witness-stand, and to be cross-examined freely. I desire that my family, who have generally been with me, shall be heard in the same manner. I desire to call other witnesses competent to testify. It concerns the interests and honor of the Army that I should have a hearing. But if this cannot be done, then I wish to tender to the honorable the Secretary of War my resignation as a chaplain of the Army, and to lay the facts which I have for years been accumulating with greatest care before the churches and the country at large.

With malice towards no one whatever, but with Christian love towards all, though in deepest sorrows and personal griefs,

I have the honor to remain, with great respect, your ob'd't servant,

CHARLES M. BLAKE,
Post Chaplain, U. S. A.

To the Hon. J. M. SCHOFIELD,
Sec'y of War, Washington, D. C.

IV.

The mental disease of the claimant manifested itself more decidedly soon after the said letter was written. After it came to the hands of the commandant of the post, Captain Vonderslice, an officer stationed at Camp McDowell, called his attention to the mental condition of the claimant, and suggested to him that the claimant was not responsible for his act in writing the said letter. The commandant thereupon retained the said letter until the 31st of the same December, and then forwarded it with the following official indorsement:

H'DQ'RS SUB. DIST. OF THE VERDE,
Camp McDowell, A. T., Dec. 31st, 1868.

Respectfully forwarded.

I most urgently recommend that the resignation of Chaplain Blake, within tendered, be accepted. The tenor of this and other communications forwarded will, no doubt, convince the department commander of his utter uselessness in the position he holds. I believe the dist. com'd'r is personally acquainted with him. I am satisfied that a minister of the gospel who would command the respect of the soldiers & citizens would be very desirable at this post, but the present incumbent of the chaplaincy at this post is a disadvantage & reproach to both the church and the Army.

(Signed) A. J. ALEXANDER,
B't Brig. Gen'l, Com'g.

21 V.

The following further official proceedings took place, with reference to the said letter, at the respective times when the same are dated:

H'DQ'RS DISTRICT OF ARIZONA,
Tucson, A. T., January 7, 1869.

Respectfully forwarded, recommending the acceptance of the resignation.

(Signed) THOMAS C. DEVIN,
Lieut. Col. 8th Cav., B't Brig. Gen'l, U. S. A., Commanding.

H'Q'RS D'P'M'T, *Jan'y* 27, '60.

Respectfully forwarded.
I recommend immediate acceptance of this resignation.
(Signed) E. O. C. ORD.
B'v't Major-Gen'l.

H'DQ'RS MIL. DIVISION OF THE PACIFIC,
San Francisco, Cal., Jan'y 29, 1869.

Respectfully forwarded to the Adjutant-General of the Army.
Although charges of conduct unbecoming an officer and a gentleman have been preferred by Gen. Alexander against Chaplain Blake, and a court ordered in his case, I recommend the immediate acceptance of his resignation.
(Signed) H. W. HALLECK,
Major-General, Com'g.

Approved.
Mar. 17, '69.
(Signed) JOHN A. RAWLINS,
Sec. of War.

[Special Orders No. 62.]

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
Washington, March 17, 1869.

* * * * * * *

The resignation of Post Chaplain Charles M. Blake, U. S. Army, has been accepted by the President, to take effect March 17, 1869.
By command of General Sherman:
(Signed) E. D. TOWNSEND,
Assistant Adjutant-General.

VI.

On the 29th March, 1869, the claimant sent the following telegram to R. C. McCormick, then Delegate from the Territory of Arizona, at Washington:

NAPA CITY, CAL., *March* 28, 1869.

Hon. R. C. MCCORMICK,
Washington, D. C.:

Sick. Resignation not intended. If so construed, withdraw it immediately.

CHARLES M. BLAKE,
Chaplain, U. S. A.

22 The said McCormick immediately laid this telegram before the Secretary of War, and was informed by him that the claimant's resignation had been accepted and was beyond recall.

This telegram was sent by the claimant at the instigation of his family after four or five days' persistent entreaty on their part. At the time of sending it his mental condition was much worse than when the said letter of December 24 was written. He was then totally unqualified for business.

VII.

The said acceptance of the claimant's resignation having been officially communicated to him, he, on the 27th day of April, 1869, addressed the following letter to the Secretary of War:

NAPA CITY, CAL. *Ap'l 27th*, 1869.

HON. JOHN A. RAWLINS,
Secretary of War, Washington, D. C.:

DEAR SIR: To my great surprise I was yesterday informed, thro' H'd Q'rs Dep't of California, that my "resignation" as post chaplain, U. S. Army, "had been accepted by the President," "to take effect March 17th, 1869."

As I am not aware of having at any time resigned my commission, and as I am now in a state of feeble health, caused by efficient services in the line of duty in 1863, 1864, and since, I beg that the favorable reconsideration of the President may be given to my case, and that I may be ordered before a retiring board for examination, and to duty if fit for it.

Justice to the service, no less than to myself and family, after eight years of devoted labors, will not permit me to be silent in view of the wrongs done me at Camp McDowell, A. T., and I am confident that you will not allow me to suffer wrongfully.

I have the honor to remain, with great respect, your ob'd't servant,
(Signed) CHARLES M. BLAKE,
(*Late*) *Post Chaplain, U. S. A.*

The said last-named letter was referred to the Adjutant-General, who returned it with the following indorsement:

Respectfully returned to the Secretary of War with the paper on which the resignation of Chaplain Blake was accepted. Chaplain Blake appears not to be of sane mind.
(Signed) E. D. TOWNSEND,
Adj't-Gen'l.

A. G. O., *May* 15, '69.

At the time when the claimant wrote the said last-named letter he was not of sound mind.

VIII.

On the 2d of July, 1870, there were 24 post-chaplains in the Army, exclusive of Blake. On the 7th of the same July the President nominated to the Senate six persons to be post-chaplains in the Army to rank from July 2, 1870. Among the nominations so made was the following:

"Alexander Gilmore, of New Jersey, vice Blake, resigned."

On the 12th July, 1870, the Senate advised and consented to the appointment of the said Gilmore, agreeably to his said nomination;
23 and on the 14th of the same July he was duly commissioned as such post-chaplain, to rank as such from the said 2d day of July. Said Gilmore has regularly received his salary as such post-chaplain and performed the duties of said office since his appointment, and he is still serving as such.

IX.

From the 2d July, 1870, until the 17th September, 1877, the inception of this suit, the number of post-chaplains on duty and recognized by the Secretary of War have been as follows:

Until the 27th April, 1872	30
17th August, 1872	29
22d May, 1873	30
23d October, 1873	29
24th October, 1874	30
13th September, 1875	29
27th November, 1875	28
24th December, 1875	27
1st February, 1876	26
14th February, 1876	27
5th March, 1876	26
27th June, 1876	27
18th July, 1876	28
15th August, 1876	29
9th February, 1877	30
1st March, 1877	29
17th September, 1877	30

X.

The insanty of the claimant continued until about the year 1874. On the 28th of September, 1878, the President made the following order, which was, on the same 28th day of September, communicated to the claimant's counsel by the Secretary of War:

EXECUTIVE MANSION,
September 28, 1878.

It appearing from the evidence, and from the reports of the Surgeon-General of the Army and the Superintendent of the Government Hospital for the Insane, that Chaplain Blake was insane at the time he tendered his resignation, it is held that said resignaton was and is void, and the acceptance thereof is set aside. Chaplain Blake will be ordered to duty, and paid from the date of the resignation of Post-Chaplain Preston Nash, to wit, May 14th, 1878, by which resignation a vacancy was created, which has not been filled. The claim of Chaplain Blake for pay from the date of his resignation to May 14th, 1878, during which his successor held the office, discharged its duties, and received pay is not decided, but is left for the decision of the court, where it is understood to be now pending.

R. B. HAYES.

24 XI.

On the 2d day of October, 1878, the following order was issued by direction of the General of the Army:

[Special Orders No. 212.]

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
Washington, October 2, 1878.

1. It appearing from the evidence presented, and from the reports of the Surgeon-General of the Army and the Superintendent of the Gov-

ernment Hospital for the Insane, that Post-Chaplain Charles M. Blake, U. S. Army, was insane at the time he tendered his resignation, December 24, 1868, said resignation is, by direction of the President, declared void, and the acceptance of the same in letter from this office dated March 17, 1869, as announced in Special Orders No. 62, March 17, 1869, from this office, is set aside.

Chaplain Blake is restored to the list of post-chaplains of the Army with his original date of rank, and with pay from May 14, 1878, since which date a vacancy in that grade has existed. He will report in person to the commanding officer, Department of Arizona, for assignment to duty.

* * * * * * *

By command of General Sherman.
(Signed) E. D. TOWNSEND,
Adjutant General.

25 XII.

He was appointed chaplain in the Volunteer service Aug. 13th, 1861, by the Governor of Missouri, and continued as such till June 4th, 1862. He was appointed hospital chaplain of Volunteers June 4, 1862, and accepted the appointment June 7th, 1862; his resignation as such was accepted July 25, 1863, to take effect July 21st, 1863. He was mustered into service as Capt. of Co. C, 3d Reg't U. S. Colored Infantry, July 26, 1863, and honorably discharged as such Aug. 11, 1864. He was appointed hospital chaplain of Volunteers Nov. 10, 1864, to rank from Sep. 26, 1864; accepted the appointment Dec. 26, 1864; and was discharged to date May 10, 1865. He was appointed post chaplain
26 at Fort Whipple May 17, 1866. He was commissioned post chaplain, U. S. Army, April 6, 1867, to rank from April 3, 1867, and accepted the commission June 10, 1867. Congress by act of July 27, 1866, authorized him to be paid from the 10th of May, 1865, to the 18th of May, 1866, the full pay and allowance of a chaplain in the Army, to wit, the sum of $1,560, less the amount paid him under the joint resolution approvev June 27, 1866.

XI.—*Conclusions of law.*

I.

The claimant's letter of December 24, 1868, to the Secretary of War, was, in consequence of the circumstances under which it was written, and forwarded, and received, and for the reasons set forth in the opinion of the court, a resignation of his office.

II.

Such resignation being accepted, and the acceptance thereof duly notified to the claimant, the claimant ceased thereby to be an officer in the Army of the United States.

III.

Having been paid in full for his official services up to the time when his resignation took effect, he is not entitled to recover in this action, and his petition must be dismissed.

27 XII.—*Opinion of the court.*

DAVIS, J., delivered the opinion of the court:

In Mimmack's case, decided at the late term of the Supreme Court, it was held that a written resignation to the President or the proper executive officer, and the acceptance of the same, duly notified to the incumbent in the customary mode, creates a vacancy in an office.

In the present case there was a written resignation of his office by the claimant, admitted to be under his signature, and to have been sent by him with a purpose that it should reach the proper executive officer. This resignation was duly accepted, and the claimant was notified of the acceptance in the customary mode. If the case rested here, these facts would put the claimant in the position which Mimmack occupied when the Supreme Court held that he had no right to the office formerly held by him.

It is maintained, however, that the present claimant was of unsound mind when he wrote and sent the letter which was accepted at the War Department as a resignation, and the court find that there is ground for the contention. If this is so, the element of sound conscious purpose was wanting to the alleged resignation.

A new feature, however, comes into the case with the appointment of a successor to the claimant. The statute permitted but thirty officers of the claimant's grade in the Army. In consequence of his letter of resignation, his vacant seat was filled by the combined act of the President and the Senate. His successor was duly commissioned, and entered upon the duties of the office, and has received the emoluments for which the claimant now sues. This action is, therefore, in effect an attempt to try, under the form of a suit for deferred salary, the respective rights of these gentlemen to the office in question. It is to be observed that but one of them is in court.

The claimant rests his case on the alleged fact of insanity when he wrote his letter of resignation. If the War Department had acted in ignorance of this fact, or if it had displaced him after a full knowledge of it, a case unlike the present one would have been presented. In this case the findings show that the claimant had been suffering from physical disease and mental prostration for some time before he wrote his letter of resignation. It was not until after the date of that letter, however, that these symptoms developed to such an extent as necessarily to induce persons who came in contact with him to believe that he was mentally incapable of acting with sound reasoning purpose.

After the letter had been put into the hands of the commandant of the post, to be forwarded to Washington, it was brought to the notice of that officer that the claimant was in an excitable frame of mind, and that it was questionable whether he was responsible for his acts. The commandant did not forward the letter until a week after it was written. Presumably he delayed in order to inquire about the claimant's condition, and to ascertain whether he did or did not know what he was about. The results which were reached are stamped in unmistakable terms on the recommendation which accompanied the claimant's resignation. We find there none of the tenderness with which a gallant soldier would naturally treat a brother officer, afflicted with the most terrible malady that can befall a man. On the contrary, it contains an urgent recommendation that the claimant's resignation be accepted, because the commandant looks upon him as a disadvantage and a reproach both to the church and the Army. It is, therefore, clear beyond all reasonable doubt that this officer, after personal inquiry, reached the conclu-

28 sion that the claimant was not of an unsound mind, and that his eccentricities were not attributable to insanity.

In all this the commandant acted on the very question which we are now asked to pass upon. He was the proper executive officer to act on that question. From the nature of the case and from the character of his command, he was authorized to pass upon it; it was his duty to decide it. Nobody intimates, nobody thinks that his decision was influenced by improper motives, or that it was not in accordance with his own best judgment. Seen in the light of subsequent events, the decision was probably wrong. Viewed in the light of contemporaneous evidence, it was right in the judgment of the commandant. It was not questioned at the War Department, and we are all of opinion that we have no power to review or question it here.

Even if we had that power, it would be presumptuous to say with dogmatic certainty that the commandant erred when he trusted to the evidence of his senses. It is one of the most difficult of problems to fix the moment when a sound mind yields to its hallucinations and becomes incapable of further healthy action. A recent critic says: "The doctors of the insane have been studious of the state of Hamlet's mind—Doctors Ray, Kellogg, Conolly, Maudsley, Bucknill. They are unanimous in wishing to put Hamlet under judicious medical treatment, but they find it harder than Polonius to hit upon a definition of madness:

> '—— for, to define true madness,
> What is't but to be nothing else but mad?'"

The suggestion in the criticism is acute and just. Experts may exhaust their learning in reading insanity through the lines of letters and written diagnoses, but they cannot infallibly tell why one man is mad and another is not, or why the first is insane at one time and sane at another. It is not safe to put absolute faith in their judgment, especially if it calls for a disregard of the results which intelligent laymen reach from a personal study of the condition of the alleged insane person.

The claimant's history presents many circumstances calculated to excite sympathy. If the court as a body were allowed to give heed to the sympathies of the individuals who compose it, perhaps its judgments would accord less with what it holds to be sound principles. It is to be observed, however, that the claimant's position before the government in this matter is somewhat analogous to the position of a person of unsound mind in an ordinary civil tribunal. A contract made by such a person can be enforced there only in certain exceptional cases, where he has received a quid pro quo which controlling principles of policy require the court to recognize. In like manner no force would be knowingly given by an executive officer, or by the law advisers of an executive department, to a resignation tendered in a state of insanity; and if a resignation offered under such circumstances should be accepted without knowledge of the facts, there can be no doubt that, on their coming to the knowledge of the executive officers, the inadvertence would be rectified as far as possible. (6 Op. Att'y Gen., 456; 10 Op. Att'y Gen., 229; opinion of Att'y Gen. Devens in the present case.)

On the other hand insanity is no protection in the courts against liability for the direct and proximate consequences of acts of an insane person which are not in the nature of contract. As between two parties alike innocent of intent to cause injury, the law says that the party by whose act the injury comes shall be the sufferer, without regard to the intent or capacity of intent to cause it. In the same way the depart-

ment says in effect to the claimant, whatever we might have been
29 willing to do for you had the vacancy not been filled, we can do nothing now. As the result of an act which is none the less yours that you did it without conscious purpose, another has been put in your place, and has acquired rights which we cannot disregard. If one of two innocent parties must suffer, the law lets the injury fall on him by whose act it became inevitable, and his remedy must be sought in Congress, not in the courts.

In the view which we take of this case it has become unnecessary to consider the act of 1866 (R. S., § 1229), which was the subject of discussion on both sides at the trial. If the claimant fell out of the Army by resignation, a statute relating to dismissals does not touch his case; and in any view that can be taken of the facts, it is impossible to regard the claimant's retirement as a dismissal within the meaning of the term as used in the act of 1866. We have also purposely omitted to consider either the constitutional effect of the nomination and confirmation and commissioning of Gilmore upon the status of the claimant, or the narrower question of the power of this court to review the action of the President in accepting a resignation. On the latter point I express my individual concurrence with the doctrine laid down by my brother Nott in Mimmack's case, that "whether an officer of the Army has resigned or has not resigned is a question which the judiciary cannot try; a certain piece of paper is indeed before the court bearing the appearance of a resignation, but whether it was such or not, the President alone could decide." (10 Ct. Cl. R., 599.)

Resting its decision, however, solely on the ground first above stated, in which we all unite, the court directs that the claimant's petition be dismissed.

30 XIII.—*Judgment.*

CHARLES M. BLAKE
v.
THE UNITED STATES. } No. 11779.

At a Court of Claims held at the Capitol in the city of Washington, on the 26th day of May, 1879, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find for the defendants and do order, adjudge, and decree that the claimant's petition be dismissed.

31 XIV.—*Application for appeal, and allowance of the same.*

CHAS. M. BLAKE
v.
THE UNITED STATES. } No. 11779.

At a Court of Claims held at the Capitol, in the city of Washington, on the 16th day of June, 1879, Mr. R. P. Lowe, for the claimant, presented an application for the allowance of an appeal, filed of the same date, and it was ordered that it be allowed as prayed for.

32 In the Court of Claims.

CHARLES M. BLAKE
vs.
THE UNITED STATES. } No. 11779.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby

certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court and of the judgment of the court, of the application for the allowance of an appeal and the allowance of the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 13th day of August, 1879.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsement on cover:) No. 773. Charles M. Blake, appellant, vs. The United States. Court of Claims. Filed 8th April, 1880.

REC. 773—2

SUPREME COURT U.S.
FILED
JAN 17 1881

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1880.

CHARLES M. BLAKE, *Appellant*,
vs.
THE UNITED STATES, *Appellee*.
No. 773.

BRIEF FOR APPELLANT.

This an appeal from the Court of Claims.

The following are the material facts: On and before December 24, 1868, appellant was post chaplain in the Army of the United States.

On that day he sent a conditional resignation to the Secretary of War.

This resignation was accepted, to take effect March 17, 1869.

Appellant was insane at the time of his alleged resignation.

On the 14th of July, A. D. 1870, Alexander Gilmore was commissioned, after having been nominated to and confirmed by the Senate, as post chaplain, *vice* Blake, resigned.

September 28, 1878, the President ordered the acceptance of the said resignation to be set aside upon the ground that the resignation was void, because appellant was insane at the time he made it; and appellant was ordered to duty with pay from May 14, 1878, the date of the resignation of Post Chaplain Nash, by which a vacancy was created.

The Court of Claims erred in holding—

1. That said claimant's letter of December 24, 1868, was a resignation of his office.

2. That by the acceptance of claimant's alleged resignation he ceased to be an officer of the Army of the United States.

3. That claimant was not entitled to recover, and that his petition be dismissed.

The said letter of the 24th of December, 1868, was not a resignation. It was manifestly nothing more than a demand for an investigation, with a declaration that if such investigation could not be had the writer would tender his resignation. The proper action upon this letter would have been an answer as to whether or not the writer could have the desired investigation. To take and treat it as an absolute resignation was a plain perversion of its meaning and purpose. It was simply taking a snap-judgment against a sick and absent man.

An insane man is incapable of accepting or resigning an office.

Parsons on Contracts, vol. 1st, chap. 19,383, says: "They who have no mind cannot agree in mind, and as that is the essence of a contract they cannot enter into a contract." "That if one enters into a contract while deprived of reason, and afterwards recovers his reason he may repudiate his contract."

If these are correct principles there was, in fact, no resignation in this case. The seeming resignation was a nullity, and its acceptance (even if the insanity was not at the time known) an error, and its correction relates back to the date of resignation.

Attorney-General Cushing, 6th Opin., 456, and Attorney-General Bates, 10th Opin., 229.

Both held that the resignation of an insane officer to be a mere nullity, not to be made valid by its acceptance, and the

recalling of the acceptance is the mere correction of an error. It follows that in such cases there is no resignation, and if there is no resignation there is no waver of pay and the party is still in the service.

The Secretary of War referred this case to the present Attorney-General, Mr. Devens, for an opinion. In giving it he expressed his concurrence in the foregoing opinions; but on the subject of back pay held, in substance, that it could be refused if plaintiff's successor had been appointed without knowledge of the insanity. This, however, was not the case. His successor was not appointed till July, 1870; whereas the War Department had notice of his insanity in the spring of 1869, as will appear from a letter written by the Adjutant-General, Mr. Townsend, on the 15th day of May, 1869, in which he states the fact. Not only so, but the plaintiff, on the 28th day of March, 1869, sent a telegram to Governor McCormick, then in Washington, to the following effect: "Sick. Resignation not intended. If so construed, withdraw it immediately. Charles M. Blake, chaplain, U. S. A.;" which was immediately laid before the War Department. And this shows that he had no intent to resign, without which there could not be a resignation in law. From these facts it follows that there was no vacancy; and, if no vacancy, the plaintiff was a subsisting officer. The appointment of a successor under such circumstances was an illegal and nugatory act, and could not have the effect to displace the right of plaintiff to back pay.

Where an order of the President dismissing an officer is afterwards revoked as having been by mistake or error, it relates back to the time of the error, and leaves the officer as though the order of dismissal had never been made.

Smith *vs.* U. S., 3d Court of Claims R., 206.
Winter's case, 3d Court of Claims R., 136.

These cases followed the opinion of Attorney-General Crittenden as he gave it in the Draine case, when an officer had been kept out of the service for years upon the mistaken supposition that he had resigned, (similar in principle to the

appellant's case). Mr. Crittenden said: "The uniform usage in similar cases has been, as I understand, to allow compensation; and I am unwilling to disturb what the experience and wisdom of the past has practically settled. The usage seems to me not to be unreasonable, and I follow it the more readily in this instance, because it furnishes some measure of redress to an injured citizen." (3d Court of Claims, 139. See also 4th Ct. Cl., 217, in the case of Barnes *vs.* U. S.)

Mere sickness and incapacity to fulfill the duties of an office do not make a vacancy.

Sleigh *vs.* U. S., 9th Ct. Cl. R., 369.
State *vs.* Baird, 47 Mo. R., 301.

Again: when a person holds an office during good behavior, with a fixed salary annexed thereto, the tenure of such an office cannot be altered without impairing the obligation of a contract.

Allen *vs.* McKean, 1st Sumn., 276.

When the President accepts a forged resignation, or a resignation tendered by an officer *non compos mentis* and subsequently discovers the mistake and corrects it by treating the supposed acceptance as a nullity, is it for the Courts to say that the officer was out of the Army between the date of the mistake and the time of its correction? Has not the President power to set aside the acceptance of a supposed resignation when he finds that no resignation has been made?

Appellant was either in or out of the Army between March 17th, 1869, and September 28th, 1878. If he was in the Army, then of course he is entitled to his pay; if he was out of the Army then an insane officer can resign and give away the means of livelihood for himself and family beyond the possibility of recall.

The appointment of Gilmore, July 14th, 1870, does not affect the rights of appellant—

1. Because the Department was fully notified that appellant had no intention of resigning and was incapable of doing so before the appointment of Gilmore.

2. Gilmore was appointed in place of Blake resigned, when the appointing power knew that Blake had not resigned.

3. On the 17th of March, 1869, the President had no power to remove appellant.

Section 5 of the act of July 13th, 1866, vol. 14, page 92, U. S. Statutes provides: "And no officer in the Military or Naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof," and therefore the appointment of Gilmore could not operate to dismiss appellant.

This case is clearly distinguishable from the case of McElrath, decided this term, for McElrath was removed while the power of removal was vested in the President, and before the said act of July 13th, 1866.

There seems to be nothing in the point that because the salary of the office has been paid to Gilmore therefore appellant cannot recover. Suppose the President should appoint some one judge of a United States Court in place of one who had filled the office many years, who had become *non compos mentis*, and the appointee should perform the duties and draw the salary. Would that deprive the invalid of the right to his salary?

Mistakes are frequently made in the transactions of business in which money due one man is paid to another; but such mistakes do not affect the rights of lawful claimants.

If there is a recovery in this case Congress will make an appropriation to pay the amount and that will end the matter.

It is submitted that the opinion of the Court of Claims is unsound and untenable, for the following reasons:

1. The court finds as a matter of fact that appellant was insane when he tendered his alleged resignation on the 24th of December, 1868, and then undertakes to argue away the force of the fact by supposing that his commanding officer did not think that appellant was of unsound mind at that time. What the said commanding officer did think does not appear, nor is it material, for the rights of the parties are to be determined here by the facts, and not by the opinions of any merely executive officer. Suppose the said commanding officer had thought that appellant was dead, and had acted upon that assumption, would it be the duty of the court to hold that he was dead because the said officer thought so, or that official action based upon that assumption was valid, when the fact appears that at the time of such action appellant was alive? The fair inference from the said commandant's letter is that he was angry with appellant and willing to take advantage of his mental infirmity to get rid of him.

2. Does the court below mean to say, by suggesting that this is an attempt to try the right of the appellant to the office that Gilmore holds, that if the Government pays the salary of one man to another that the person to whom the salary belongs may not sue for it in that court?

Congress can protect Mr. Gilmore from harm, if necessary, but appellant is not to be deprived of his legal rights by sympathy for his alleged successor.

3. The court below says: "In like manner no force would be knowingly given by an executive officer or by the law advisers of an executive department to a resignation tendered in a state of insanity, and if a resignation offered under such circumstances should be accepted without knowledge of the facts there can be no doubt that on their coming to the knowledge of the executive officers the inadvertance would be rectified as far as possible."

Upon this it may be remarked—

1. That it is found by the Court of Claims that the attention of appellant's commanding officer was called to the mental condition of appellant at the time he wrote the said letter of the 24th of December, 1868, and it was suggested by a fellow-officer that appellant "was not responsible for his act in writing said letter." It is also found by said Court that "the mental disease of. appellant manifested itself more decidedly *soon* after the said letter was written." Seven days, or *soon* after said letter was written, it was forwarded by said commanding officer to the Department with an urgent recommendation that the imaginary resignation therein contained should be accepted, and it is therefore a legitimate, if not necessary, conclusion from these facts, that said commanding officer knew that appellant was insane on the 31st, if not on the said 24th of December.

2. It is perfectly clear that when said Gilmore was appointed it was known in the War Department that appellant was insane when he wrote said letter, and did not intend to resign, and the executive officers did not rectify the inadvertance, if it was one, as soon as possible, but with a full knowledge that said resignation and its acceptance were nullities they proceeded to appoint Gilmore vice Blake resigned.

4. The doctrine suggested by the court below, that where two innocent parties must suffer, the party by whom all the injury comes should be the sufferer, does not apply here, or if it does it in no way operates against appellant. This is a question between appellant and the United States. The United States are not innocent parties, because they knew that appellant was insane when they undertook to fill his office, and if any injury results to anybody it will be through the mistake or misconduct of the United States. The injury to Mr. Gilmore by giving to appellant what belongs to him is altogether imaginary.

5. If the opinion of Mr. Justice Davis, concurred in by Justice Nott, to wit "whether an officer of the Army has re-

signed or has not resigned, is a question which the judiciary cannot try. A certain piece of paper is indeed before the court bearing the appearance of a resignation, but whether it was such or not the President alone could decide," is correct, then it follows that the appellant's claim is good, for the President has decided that he never did resign, and has ordered him to duty, treating the alleged resignation and acceptance as perfect nullities.

To uphold the doctrine of the Court of Claims is to say in effect, that an officer of the United States whose tenure of office is during good behavior, can be removed by the President and Senate by the appointment of another to his place, so that the officer whose removal is so attempted, is not entitled to his salary while his alleged successor is recognized as holding the office.

GEO. H. WILLIAMS,
For Appellant.

OFFICE SUPREME COURT U.S.
FILED
JAN 8 1861
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

CHARLES M. BLAKE, APPELLANT,
v.
THE UNITED STATES. } No. 773.

SUBMITTED UNDER RULE XX.

BRIEF FOR APPELLEES.

In the Supreme Court of the United States.

CHARLES M. BLAKE, APPELLANT,
v.
THE UNITED STATES.
No. 773.

SUBMITTED UNDER RULE XX.

BRIEF FOR APPELLEES.

On the 24th December, 1868, Charles M. Blake tendered his resignation as chaplain in the Army of the United States, which was accepted March 17, 1869. On the 7th of July, 1870, the President nominated to the Senate Alexander Gilmore, of New Jersey, *vice* Blake, resigned; the Senate advising and consenting thereto, Gilmore was duly commissioned.

Seven years later Blake brought this suit in the court below, alleging that he was insane at the time he wrote out and sent the resignation. The court held that, although subsequent events demonstrated that to be so, yet the very question was at the time considered and decided by the commandant of the post, and is not open to review.

I.

The opinion of Davis, J., in delivering the judgment of the court, we think is sound, as is also the position taken by Nott, J., in Mimmack's case (10 C. C., 599).

The acceptance of the resignation (Record, p. 10) was the act of the President by virtue of the executive power vested in him. After its acceptance, the Adjutant-General called the attention of the Secretary of War to the appearance of insanity in Blake.

The President then waited a whole year. In July, 1870, after, it may be assumed, careful and deliberate consideration of the question, he took the decisive step of nominating Gilmore in Blake's place.

Can the court try anew the very question of fact which was thus considered by the Executive? The letter of resignation reached the War Department soon after January, 1869. During the succeeding year and a half the power to decide on the validity of the resignation must have been lodged somewhere. In the absence of legislation conferring that power on the courts, it seems inevitable that it should be vested in the Executive, to be by him decided once and forever. As is said by Savage, chief justice (*Jackson* vs. *Gumaer*, 6 Cowen, 568), "it is clear that the acts of a lunatic before office found are not void but voidable."

And the reason in Beverly's case seems to apply with peculiar force to the act of the Executive in giving Blake's place to Gilmore (Coke's Reports, Part IV, p. 124): "But there are some acts done by a man *non compos mentis* which none of them (that is, not even privies in blood or in representation) shall avoid; and therefore if

he levies a fine or suffers a recovery or acknowledges a statute or recognizance neither his heir nor his executors shall avoid it, for these are matters of record which shall not be avoided by a bare averment of *non compos mentis* for the inconvenience which may thence ensue; also, such averment is against the office and dignity of the judge, for he ought not to take any connusance of a fine or recogizance of him who is *non compos mentis*.' (Affirmed in *Murley* vs. *Sherren*, 8 A. and E., 756, temp. 1838, where it was held that the fine must stand against the lunatic or his heirs until in a court of equity it was shown that fraud had been practiced.)

The inconveniences ensuing upon an inquiry by the Court of Claims into the insanity of an officer eight years after his resignation, and seven years after the President and Senate had acted upon such resignation, are numerous and manifest.

From the 14th July, 1870, to the commencement of this action Gilmore's title to the office of chaplain and his right to pay would depend on what proceedings *de lunatico* Blake might institute.

The nomination, confirmation, and appointment of Gilmore did not vest any office or rights in him if at the time or by the appointment itself Blake had not been displaced. For by act of July 7, 1838 (5 Stat., 308), and act of March 2, 1849 (9 Stat., 351), the number of post chaplains was fixed at 30, and it appears from the eighth finding of the court that there was not room for Gilmore among the post chaplains on the day he was appointed. Performing the duties of the office as Gilmore did, upon the theory of claimant he was liable to be displaced at any moment, and be subject to action for the salary received. (See McElrath's case, decided at this term.)

The inconveniences consequent upon claimant's theory are too manifold to require elaboration.

Such inquiry, it seems to us, is also "*against the office and dignity*" of the Executive, for he ought not to take any connusance of a "resignation" of him who is *non compos mentis*.

Although not in strict analogy with the levying of a fine or a common recovery, it seems to us that the acts of the President in the matter were discretionary and *quasi* judicial; they are matters of record; and the acts of the Senate, of Gilmore, of the commandant of the post, of the accounting officers of the Treasury have since been based thereon. Full effect has been given to this acceptance by all these officers; and from every point of view it seems to us that the law as laid down by Coke is applicable.

II.

But the claimant goes one step further. He says not only that his resignation and acceptance are voidable, but that the act of the President, by the advice and consent of the Senate, in taking his place from him and giving it to another is voidable also. How far he is willing to go in contending that solemn official acts are voidable because they can be traced back to the act of an insane person does not appear; but his logic would lead very quickly to absurd consequences.

Whether the law in Beverly's case be applicable to the acts of the President alone or no, it is clearly applicable to matters of such record as are performed by the joint action of the Senate and President.

It is also to be borne in mind that the courts in voiding the acts of a lunatic, carefully distinguish between

executory and executed contracts. (Browne's Medical Jurisprudence of Insanity, § 27, ed. of 1875.) Gilmore cannot be placed *in statu quo*, even if by another action the United States could.

III.

But whether sane or insane when the resignation was tendered, whether in the service or out of the service on the 13th July, 1870, we take the broad ground that on the 14th of that month he was removed by the President and Senate in virtue of the power given by the Constitution.

In 1789 it was resolved by both houses of Congress that the power of removal, by virtue of the Constitution, was vested in the President alone. It was frequently exercised by him; but in 1867 the antagonism between the Thirty-ninth Congress and the President culminated in the civil tenure act and the impeachment of Andrew Johnson. During that trial the question of removal was illuminated by wealth of argument, and the argument was conducted with such intensity of conviction as to leave to future explorers a very barren field. Two things are to be noticed in that argument: The most bitter opponents of the President never suggested that Congress might impair, limit, or control the power of the President when he acted by and with the advice and consent of the Senate. No one suggested that the President, as Executive, had any greater or less constitutional power of removal over the civil service than over the military and naval service.

In *ex parte Hennen*, Thompson, J. (13 Peters, p. 259), in speaking of the practical construction given to the Constitution, says: "No one denied the power of the

President and Senate jointly to remove where the tenure of the office *was not fixed by the Constitution.*"

Whether the legislature, after fixing a term to the office, can provide that the President alone shall not remove the incumbent, is a question not necessary to be discussed in this case.

Our proposition is, that if the act of July 13, 1866, is open to two interpretations, the one ought to be adopted which is most consistent with other legislation of the same Congress, which is most remedial of prior legislation, and which is most consistent with the Constitution.

Claimant says this act was intended to circumscribe and limit the joint power of the Senate and the President. We say it was only intended to limit the power of the President alone. At the time of its passage President Johnson had vetoed three of the political bills that had been presented by Congress. Congress was jealous of the power over the personnel of the Army which by the act of 1862 was declared to be in him. The House of Representatives had no distrust of the Senate, and the control of the Senate over ordinary removals was sufficient guarantee that the President could not vent his hostility to both branches by making removals except under the act of 1862.

Section 5 of the act of July 13, 1866 (14 Stat., 92), so far as it affects the case, is as follows:

> That section 17 of an act entitled "An act to define the pay and emoluments of certain officers of the Army," approved July 17, 1862, * * * is hereby repealed. And no officer in the military or naval service shall, in time of peace, be dismissed from service except in pursuance of the sentence of a court-martial to that effect, or commutation thereof.

The other acts, *in pari materia*, are as follows:

Section 17, act of July 17, 1862 (12 Stat., 596). "The President of the United States be, and hereby is, authorzed and requested to dismiss and discharge from the military service, either in the Army, Navy, Marine Corps, or volunteer force, any officer for any cause which in his judgment either renders such officer unsuitable for or whose dismission would promote the public service.

Section 12, act March 3, 1865 (13 Stat., 48). In case any officer of the military or naval service who may hereafter be dismissed by the authority of the President shall make application in writing for a trial, setting forth under oath that he has been wrongfully and unjustly dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he was dismissed. And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within six months from the presentation of his application for trial, the sentence of dismissal shall be void.

It is apparent at a glance that the act of July 13, 1866, was a step further in the direction taken by the act of 1865. But simply repealing the act of 1862 left the law just where it stood before that act was passed.

As has been pointed out in the case of Tyler (XV Opinions, p. 421), the President from the adoption of the Constitution had frequently exercised the power of dismissal, and his authority therefor had been sustained by Attorneys-General Legaré (4 Opinions, 1), Clifford (4 Opinions, 603), and Cushing (6 Opinions, 4; 8 Opinions, 233).

In addition to repealing the act of 1862, Congress deemed it advisable to enact that "no officer in the military or naval service shall in time of peace *be dismissed*," &c., using the exact word which is found in the acts of 1862 and 1865, and which in those acts meant dismissal by the President alone.

The plain and natural meaning of the act is that Congress, so far as it had the power, would prevent the President in time of peace from the exercise of the arbitrary power of dismissal.

That Congress meant to go further and bind the President and the Senate is to say that it intended, so far as the President and Senate were concerned, to give to officers in the military and naval service the same tenure of office and the same independence in action that the Constitution, for manifestly wise reasons, conferred on the judiciary.

Congress doubtless has the power to limit the duration or occupancy of an office other than the judiciary. But whether it can so fix the tenure that the incumbent can hold in defiance of the President and Senate is a grave constitutional question. The only court to which the constitutionality of the civil tenure act was submitted divided. A numerical majority of the Senators held it to be constitutional; a minority, sufficient however to make the judgment of the Senate, held that it was not. That question may be considered still open: yet it is one inferior in its importance and consequences to the constitutionality of the act of July 13, 1866, if that act is to be interpreted as claimant argues. The discussion which sprang from the attempt to limit the authority of the President alone, and the momentous events consequent upon that effort, warn us that this is not a case which justifies the opening of so ponderous a question, nor should it be presented on written arguments.

Should any distinction, however, be attempted between the civil and military services, it is worthy of note that the Constitution, in giving to Congress the power to raise and support armies, provided that no appropri-

ation to that use should be for a longer term than two years. Manifesting a purpose, so far from giving or permitting to the military the tenure which it expressly gave to the judiciary, of making the Army dependent on Congress for its very existence.

CHARLES DEVENS,
Attorney-General.
JOHN S. BLAIR.

No. 773——2

Supreme Court of the United States.

EXPARTE,

JOHN H. BURTIS,

AND

JOHN M. GRAFF.

Petition and other Papers on Application for a Writ of Mandamus.

ANDREW J. TODD,
Counsel for Petitioners,
New York.

Exparte,
JOHN H. BURTIS and
JOHN M. GRAFF.

I hereby waive notice of the application for a rule directing that a mandamus be issued by the Supreme Court of the United States in accordance with the annexed petition. Such application being based upon the 1
the said petition annexed and the affidavit of John N. Graff; the order to show cause granted by the undersigned, April 6th, 1880; the order to show cause granted by the undersigned, March 25th, 1880; the affidavit of Charles C. C. Rice, sworn to April 8th, 1880; the affidavit of Susan E. Hart, sworn to March 24th, 1880; the affidavit of Michael P. Low, sworn to March 24th, 1880; the affidavit of James E. Dunn, sworn to March 19th, 1880; the affidavit of Susan E. Hart, sworn to March 18th, 1880; the affidavit of Michael Hanson, sworn to April 9th, 1880; the order entered on the 16th day of June, 1880, by direction of the undersigned; the sub- 2
pœna dated the 16th day of March, 1880; the affidavit of Susan E. Hart, sworn to March 17th, 1880; the testimony of Eliza M. Shepard, taken before B. Lincoln Benedict, Special Examiner, March, 1880; and the opinion of the undersigned dated June 19th, 1880; all of which are annexed to said petition.

CHARLES L. BENEDICT.

Exparte

JOHN H. BURTIS

and

JOHN M. GRAFF.

Petition for a Mandamus to the Judge of the District Court of the Eastern 3
District of New York, sitting as Circuit Judge for said Eastern District of New York.

The above-named petitioners move the Honorable the judges of the Supreme Court of the United States for a rule on the District Judge of the Eastern District of New York, sitting as Circuit Judge in said Eastern Dis-

trict of New York, to show cause why a mandamus should not issue commanding him to allow the *subpœna duces tecum* issued out of that Court and duly served on Eliza M. Shepard, executrix of the estate of Charles J. Shepard, deceased, to be fully executed and enforced against the said Eliza M. Shepard, to compel her to produce and exhibit at an examination before a Special Examiner in said Eastern District, certain iron patterns
4 of an old fire-place heater, called a Nott fire-place heater, that testimony may be taken respecting said iron patterns, to be certified to and to be used upon the hearing of a suit in equity pending in the Circuit Court of the United States for the Southern District of New York; and the petitioners move for the said rule on their petition and the certified copy of the proceedings before the Special Examiner, the said judge's opinion, copy of the *subpœna duces tecum*, and other papers and proceedings connected therewith, and relating to and concerned said equity suit.

1. Because the learned judge erred in refusing to
5 allow the *subpœna duces tecum* to have effect on account of the witness not being a party to the suit.

2. Because the learned judge erred in considering that by giving effect to the writ and permitting the party defendant issuing it to proceed under it such course was not agreeable to the usages and principles of law.

3. Because the learned judge refused to let the party issuing the writ of *subpœna duces tecum* to further proceed under it on account of there not being a precedent in the books to justify the proceeding; and without the
6 party defendant issuing the writ first showing that a witness had been compelled previously in some other suit or legal proceeding to produce property as evidence; and on account of the proceeding appearing to be a novelty not agreeable to any usage of the law, and therefore not within the power conferred by statute (See U. S. Rev. Stat., sec. 716).

4. Because the petitioners have a legal right to the production of the patterns that they may be used as evidence or that evidence respecting them may be given

or both; and which is according to the principles of law (see U. S. Rev. Statutes, Sec. 716); that the said legal right does not depend on the discretion of the Court, but is fixed and is regulated by law (See U. S. Rev. Stat., Sec. 716); and there is no other legal remedy for the petitioners in the premises.

A. J. TODD,
for Petitioners.

7

To the judges of the Supreme Court of the United States.

JOHN M. GRAFF, one of the petitioners above named, and one of the defendants in the suit brought against John H. Burtis and your said petitioner by the Thatcher Heating Co., and others, in the Circuit Court of the United States, for the Southern District of New York, for alleged infringement of certain letters patent of the United States issued to one John M. Thatcher for alleged improvements in fire place heaters, states as follows: that at the time the suit was commenced one 8
Charles J. Shepard was living, and claimed to have in his stove warerooms, at No. 242 Water street, in the city of New York, the iron patterns of a certain fire place heater called a Nott Fire Place Heater, and from which he claimed he had had cast and sold fire place heaters of substantial identity with those described and claimed in said Thatcher patent for many years prior to the date of said patent, and to the date of the origination of the alleged invention of the said Thatcher referred to and claimed in said Thatcher patent; that accordingly the name of said Charles J. Shepard was set up in the answer as having knowledge of the prior use 9
and sale of the said alleged invention; that said Charles J. Shepard died before proofs were commenced to be introduced on the part of the defendants; that Eliza M. Shepard, the sister of said Charles J. Shepard, became his executrix, duly qualified as such, and became seized and possessed of said iron patterns among his other effects; that on or about the 17th day of March, 1880, a *subpœna duces tecum* was issued against the said execu-

trix for the purpose of compelling her to produce said iron patterns before an examiner of the Court specially appointed, and for the purpose of compelling testimony of the identity of said iron patterns and the fire place heaters, made by virtue of said patterns, and sold long anterior to the making of said alleged Thatcher invention, and their exhibition to experts that they might testify respecting their form, appearance, construction
10 and identity, and for the purpose of comparing them with complainants said patent; that so far as your petitioner can learn, after diligent search, none of the fire place heaters are now in existence, their places having been supplied by the more modern styles of fire place heaters, but embodying the same form, but which modern styles are subsequent in date to the date of the alleged Thatcher invention; that said witness appeared before the Special Examiner, but refused to produce the heater patterns unless compelled to by the Court; that on the hearing of the application to the Court to compel the witness to further obey the *subpœna* by producing the
11 iron patterns the existence of the iron patterns were not denied, but only the privilege of the witness to further refuse to obey the *subpœna* was raised; that the Court, after hearing argument thereon, refused to compel the witness to further obey the *subpœna*, and filed an opinion thereon, a certified copy of which is hereto annexed.

Your petitioner further says, that by reason of the learned judge's course on such application, your petitioners, the defendants, are denied the right of the process of the Court for said Eastern District of New York, namely, of the *supbœna duces tecum* to compel
12 the production of the iron patterns, the only evidence extant of what the said Nott fire-place heater was, so far as its practical embodiment in metal is concerned, so that your petitioners may have the said iron patterns viewed, identified, and take expert testimony respecting the same; that it is not attempted to take from said executrix the said iron patterns and not to return them to her, but only to place them for a limited time in the custody of the officers of the court, or the court, for the

purpose of so identifying and taking testimony respecting them, and then returning said iron patterns to the custody and control of said executrix; that your petitioners' attorney, in the presence of the Court, offered to pay to said executrix all the costs and charges attending the production and the return back to said executrix of said iron patterns, after they were so identified, and testimony taken respecting them.

And your petitioner further states that the said de- 13
fendants are entirely without remedy in the premises, unless it be afforded by the interposition of this Honorable Court by their writ of mandamus; and they therefore pray that a writ of mandamus may be issued against the Honorable Charles L. Benedict, District Judge for the Eastern District of New York, sitting as Circuit Judge of the Circuit Court for the Eastern District of New York, commanding him to pass an order compelling the said Eliza M. Shepard to obey the writ of *subpœna duces tecum*, by producing before the special examiner in said equity suit the said iron patterns for the purpose of having the same identified and taking of testimony 14
respecting the same; and that such other order may be had in the premises as justice may require.

And as in duty bound your petitioners will ever pray, etc.

JOHN M. GRAFF.

Before me the subscriber, a Notary Public in and for the County of New York, appeared John M. Graff, one of the within petitioners, and made oath that the foregoing petition is true, to the best of his knowledge and belief.

JAMES H. HUNTER, 15
[Seal.] *Notary Public*,
N. Y. Co.

UNITED STATES OF AMERICA, } ss.
Eastern District of New York. }

I, B. LINCOLN BENEDICT, Clerk of the Circuit Court of the United States of America for the Eastern District of New York, do hereby certify, that the writings annexed to this Certificate are true copies of their

respective Originals, on file and remaining of record in my office.

In testimony whereof, I have caused the Seal of this said Court to be hereunto affixed, at the City of Brooklyn, in the Eastern District
[SEAL.] of New York, the 21st day of January, in the year of our Lord one thousand eight hundred and eighty-one.

16 B. LINCOLN BENEDICT,
Clerk.

UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF NEW YORK.

In the matter of the application for an attachment

against

ELIZA M. SHEPARD.

17

The order to show cause herein coming on to be heard and after hearing A. J. Todd for the motion, and Carlisle Norwood, Jr., in opposition thereto.

Ordered that the said Eliza M. Shepard have leave to introduce herein an affidavit from Michael Hasson, provided the same shall be made and produced before me Friday the 9th April inst., at 3 o'clock P. M., and further hearing of this application is postponed to said time.

CHARLES L. BENEDICT.

Dated April 6th, 1880.

18 It is consented that within hearing be further postponed to Monday, April 12th inst., at 3 o'clock P. M. Hearing to be heard at U. S. Court house in City of Brooklyn.

Dated April 9th, 1880.

A. J. TODD,
Counsel for Appellant.

NORWOOD & COGGESHALL,
Attorneys for E. Shepard.

U. S. CIRCUIT COURT,

Eastern District of New York.

In Equity.

Thatcher, Heating Co., *et al.*, *vs.* John H. Burtis, *et al.*	In the matter of the Application for an Attachment against Eliza M. Shepard in the E. Dist. of New York, 2nd Circuit.

19

On the subpoena *duces tecum* herein issued against Eliza M. Shepard on the 16th day of March, 1880, proof of service thereof, the depositions of the said Shepard and one Michael Hasson, C. C. C. Rice and Michael P. Low in this cause, and on the annexed affidavits,

20

Ordered that the said Eliza M. Shepard show cause before me on the 1st day of April, 1880, at 9.30 o'clock in the forenoon, at the U. S. Court room in the U. S. Court building No. 168 Montague St. in the city of Brooklyn, why an attachment should not issue to arrest said Eliza M. Shepard and to bring her before this Court to answer for disobedience of the said subpœna *duces tecum*, in failing to produce certain iron patterns of an old fireplace heater therein mentioned.

Dated March 25, 1880.

CHARLES L. BENEDICT. 21

U. S. CIRCUIT COURT.

EASTERN DISTRICT OF NEW YORK.

In Equity.

In the Matter of the
22 Application for an Attachment
against
ELIZA M. SHEPARD.

City and County of New York, ss.

CHARLES C. C. RICE, being duly sworn, deposes and says that he is thirty-four years old; that he is in the employ of the J. L. Mott Iron Works of the City of New York; that on or about the 20th day of February, 1880, he met Michael Hasson, the porter in the employ
23 of Eliza M. Shepard, in front of the premises No. 242 Water street, New York City; that deponent and said Hasson got into conversation about this suit, and in said conversation said Hasson stated that the iron patterns of the old Nott fire-place heater were still on those premises, and that he, Hasson, would show them to deponent if deponent would come there early some morning before the rest of them got around; that he would not show them to everybody, but he would show them to deponent.

And deponent further says, that he did not go to see said patterns as then invited, as he did not wish to take
24 advantage of Miss Shepard's employes by surreptitiously entering her premises.

CHARLES C. C. RICE.

Sworn to before me, April 8, 1880.

JAMES H. HUNTER.

[Seal.] *Notary Public,*
N. Y. Co.

U. S. CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.
In Equity.

THATCHER HEATING Co. et als.
vs.
JOHN H. BURTIS et al. 25

Southern District, City and County of New York, ss.:

SUSAN E. HART being duly sworn further deposes and says that prior to the service of the *subpœna duces tecum* herein, the witness, Eliza M. Shepard, did not deny having possession of the iron patterns called for in the said subpœna, but remarked that she would not give them up unless she was obliged to; that she would give the parties all the trouble she could before she would give them up. 26

SUSAN E. HART.

Sworn to before me March 24, 1880.

JAMES H. HUNTER,
[L. S.] *Notary Public,*
N. Y. Co.

UNITED STATES CIRCUIT COURT.
SOUTHERN DISTRICT OF NEW YORK.
In Equity.

THATCHER HEATING Co. *et als.*
vs.
JOHN H. BURTIS, *et al.*

In the matter of an application for an attachment against Eliza M. Shepard in the Eastern District of New York. 27

SOUTHERN DISTRICT AND CITY AND COUNTY OF NEW YORK. } *ss.:*

MICHAEL P. LOW, being duly sworn, deposes and says that he is 65 years old; that on the 5th day of January,

1880, at the premises of Eliza M. Shepard, executrix No. 242 Water street, New York City, he requested Michael Hasson to show him the old fireplace heater, here in controversy, which deponent claimed was in the said premises; that said Hasson claimed that the executrix had forbid him to show it to deponent; that deponent had previously seen the executrix and fully described the old heater to her, and taken an order to
28 Hasson from her to see the same; that for some unexplained reason this order was countermanded before deponent got to Hasson; that said Hasson did not deny that the old heater or its iron patterns were not on the said premises; that the deponent concluded from said Hasson's manner that the said heater was there on those premises, but that he, said Hasson, had been forbidden to show it to deponent.

M. P. LOW.

Sworn to before me
March 23, 1880.

JAMES H. HUNTER.

29 *Notary Public,*
N. Y. Co.

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

THATCHER HEATING CO., et als., *vs.* 30 JOHN H. BURTIS, et als.	In the matter of the application for an attachment against Eliza M. Shepard, in the East. Dist. of N. Y.

Southern District City and County of New York, ss.

JAMES E. DUNN, being duly sworn deposes and says, that he is forty-three years old; that he resides in Jersey City, N. J., and is employed in the Methodist Book Concern in the city of New York; that he has known Michael Hasson by sight for several years past, and to speak to him for about one year past; that in the latter

part of the month of January, 1880, he met Michael Hasson, and in conversation said Hasson stated that he had been *subpœnaed* to attend and testify respecting, and to produce an old fire place heater and the patterns of the same; that said Hasson also stated then that the patterns for said heater were still in existence, and were in the front part of the cellar of the Shepard premises, No. 242 Water street, in the city of New York; but that he could not produce them without the permission of the 31
executrix, Miss Shepard; that he would not show them up until after he got permission from her to do so; that said patterns had "1840" cast on them, and that no one on the premises but himself, Hasson, could find them, and that he did not believe there was another man in New York but himself who could put them together; that said patterns were referred to by said Hasson in conversation with deponent after that first conversation.

JAMES E. DUNN.

Sworn to before me
March 19, 1880. } 32

JAMES H. HUNTER,
[L. S.] *Notary Public,*
N. Y. Co.

U. S. CIRCUIT COURT.
SOUTHERN DISTRICT OF NEW YORK.
In Equity.

THATCHER HEATING CO. et als. *vs.* JOHN H. BURTIS, et al.	In the matter of the application for an attachment against Eliza M. Shepard in the East. Dist. of N. Y. 33

Southern District, City and County of New York, ss.:

SUSAN E. HART, being duly sworn, deposes and says that in a conversation with Eliza M. Shepard just before deponent served the subpœna on her to testify in this suit, said Shepard remarked that parties had been try-

ing to serve a subpœna on her, but that she had been too sharp for them; that they had sent men, women, and a boy after her, but that they could not catch her; that she had some time ago been under examination in the case four hours, and over fifty pages of testimony had been taken, but that they did not catch her once.

And deponent further says that said Shepard stated that it was claimed she possessed information worth a
34 million of dollars to certain parties, but that she had been too smart for them and they could not catch her; that she thought she would be through with that, the present trouble, about Saturday of this week.

And deponent further says that said Shepard appeared to be in good health; that said Shepard and deponent sat in a parlor without heat in it for upwards of half an hour; that deponent felt cold and told said Shepard so, but said Shepard remarked in reply that she did not feel cold.

SUSAN E. HART.

Sworn to before me
35 March 18th, 1880.

JAMES H. HUNTER,
Notary Public,
N. Y. Co.

U. S. CIRCUIT COURT.
SOUTHERN DISTRICT OF N. Y.

THE THATCHER HEATING COMPANY *et al.*

vs.

36 JOHN H. BURTIS, *et al.*

STATE, CITY AND COUNTY OF NEW YORK, *ss.:*

MICHAEL HASSON being duly sworn says, I am of lawful age; my occupation for more than ten years last past has been that of porter in the store No. 242 Water Street, formerly belonging to Charles J. E. Shepard and now controlled by his executrix, Miss Eliza M. Shepard.

I was present during the examination of Miss Eliza M. Shepard at Brooklyn on the 18th day of March, 1880.

I know that it is a great many years since the "Saracenic Heater" was made or sold at the office where I have been employed as porter.

From the nature of my business I am well acquainted with everything which is stored in all parts of the building, No. 242 Water Street.

If the Saracenic grate or heater was there I could not 37
fail to recognise it. I have very frequently been through every part of my employer's store of late years, and I know that the Saracenic heater is not there.

I have been for several days examined as a witness in this case, having been subpœned by Mr. Todd, the defendant's solicitor, and I always told Mr. Todd from the beginning that I would not make a search over my employer's store unless I received authority from her. I was unwilling to ask her permission for fear that she would regard it as a liberty, and would discharge me. I also repeatedly told him that I knew that if I did get permission any search that I might make would be 38
fruitless and would not result in ferreting a Saracenic heater.

I have been examined as a witness on the following days: January 29, February 12 and 14, 1880. The frequent utterances upon this case have been a great inconvenience to myself and to my employer. Besides, the occasions on which I have been examined I have had frequent interviews with Mr. Todd and others on the subject.

I have read a copy of the affidavit of Charles C. Rice, dated April 8, 1880. I unqualifiedly deny every part 39
of said Rice's affidavit which says that I have known said Rice by sight for several years, and I believe he has in the same way known me. I never had any conversation with him until in the present year, or about February 20, 1880. I am very uncertain about the precise day. I was sitting on the stoop of the Shepard store when said Rice approached me and bid be a "good day" in a pleasant and familiar way, though he had never before greeted or addressed me. Then, in

course of a conversation which he then opened, he said, substantially: "There are only two of us here together, and no one will know what we say." He talked about the Saracenic patterns, and he asked: "Do you think there are any of those patterns here?" I said, "I have been away five weeks, and they have been selling a lot of old iron, and I don't know what is here now." He said, "If we should send a strange man whom they (meaning Miss Shepard's employes at the store) would not know, to buy some old iron, and were to pay a few dollars extra for it to encourage them to sell it, could not you put them old patterns, or whatever you could find of them, with the old iron. We would pay you well for it." I told him to try to buy the old iron, and perhaps we would sell. And on the same day I repeated the conversation to Miss Shepard's bookkeeper and salesman, and suggested that we should sell any old iron that was wanted at an advanced price, and we talked it over together as a good joke at the expense of Rice and whoever he represented, that they should pay more than the market value for old iron, thinking that it involved a successful attempt to bribe me.

MICHAEL HASSON.

Sworn to before me this 9th day of April, 1880.

JOHN B. PINE,
Notary Public,
N. Y. Co.

At a Term of the United States Circuit Court for the Eastern District of New York, held at the Court Rooms in the city of Brooklyn, on the 16th day of June, 1880.

Present: Hon. CHARLES L. BENEDICT, *Judge.*

In the matter of the application for an attachment against ELIZA M. SHEPARD.

A motion having been made for an attachment against Eliza M. Shepard for refusing to obey a *subpœna duces*

tecum, dated March 16, 1880, to appear before B. Lincoln Benedict, Esq., a Special Examiner appointed for this district in an action pending in the Southern District of New York, and on reading and filing said *subpœna duces tecum* the affidavit of James E. Dunn, dated March 19, 1880, the affidavit of Susan E. Hart, dated March 18, 1880, and the order to show cause why such attachment should not issue, and the affidavit of Charles C. C. Rice, dated April 8, 1880, and after hearing A. J. 43
Todd, Esq., in favor of said motion, and on reading and filing the affidavit of Eliza M. Shepard, dated

and the affidavit of Michael Hasson, dated April 9, 1880, and after hearing Carlisle Norwood, Jr., of counsel for said Eliza M. Shepard in opposition.

It is ordered that said motion be, and the same is hereby denied.

SUBPŒNA DUCES TECUM.

The President of the United States of America, to Eliza M. Shepard, greeting:

[SEAL.]

We Command You, That all business and excuses being laid aside, you appear and attend before B. Lincoln Benedict, a Specia- 44
Examner appointed by the Circuit Court of the United States, at his office, No. 168 Montague St., in the City of Brooklyn, N. Y., on the eighteenth day of March, 1880, at 12 o'clock noon, to testify and give evidence in a certain action now pending undetermined in the Circuit Court of the United States for the Southern District of New York, between the Thatcher Heating Co., *et al*, complainants, and John H. Bur- 45
tis, *et al*, defendants on the part of the defendants, and that you bring with you and produce at the time and place aforesaid the iron patterns of an old fire-place heater now at the Warehouse No. 242 Water St., in the City of New York, and under your control as Executrix of the estate of Charles J. Shepard, deceased, which said iron patterns embody or show a fire-place heater

which has in its construction a top-feed magazine and flues, or other extended heating surface at its rear and connected with such heater; also a fire-place heater of such construction if it is in existence; and for a failure to attend, you will be deemed guilty of a contempt of Court, and liable to pay all loss and damages sustained
46 thereby to the party aggrieved, and forfeit TWO HUNDRED AND FIFTY DOLLARS in addition thereto.

WITNESS, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the City of Brooklyn, the 16th day of March, 1880.

B. LINCOLN BENEDICT.
Clerk.

SOUTHERN DISTRICT, }
CITY AND COUNTY OF NEW YORK. } *ss.*

47 SUSAN E. HART, being duly sworn, says that she 33 years old; that on the 17th day of March, 1880, between the hours of half past ten and half past eleven o'clock in the forenoon of said day, she served the within original subpœna on Eliza M. Shepard within named, while at the residence of said Shepard, No. 322 Atlantic St., in the City of Brooklyn, on said day and hour, by delivering to and leaving with said Shepard a true copy thereof, and at same time showing her, said Shepard, the said original; that she also gave her, said Shepard, at same time the sum of one dollar and eighty cents fees; that she knew the said Shepard so served to the person
48 mentioned in the said original subpœna.

SUSAN E. HART.

Sworn to before me }
March, 17th, 1880. }
JAMES H. HUNTER,
Notary Public,
New York County.

UNITED STATES CIRCUIT COURT,
FOR THE EASTERN DISSRICT OF NEW YORK.

THE THATCHER HEATING CO. *et al.*
vs.
JOHN H. BURTIS *et al.*

49

Hearing upon order to take testimony before B. Lincoln Benedict, Special Examiner, &c.

March 18, 1880.

Appear—A. J. TODD for Respondent. WM. H. L. LEE, for Claimant.

ELIZA M. SHEPARD, recalled as a witness and duly affirmed, says:

Q. 1. Have you been already examined in this case?

A. I have.

Q. 2. Are you the executrix of the estate of the late Charles J. Shepard? 50

A. I am.

Q. 3. Are you not subpoened here to produce in evidence the iron patterns of an old fireplace heater, said to have been the property of Charles J. Shepard, deceased, in his life time, and now under your control as his executrix, in the warehouse No. 242 Water street, in the City of New York, which said iron patterns are said to embody or show a fireplace heater, which has in its construction a top feed magazine and flues or other extended heating surface at its rear and connected therewith?

(Objected to as leading and incompetent, the witness not being named in the answer.) 51

A. I was.

Q. 4. Will you produce such iron patterns, that they may be referred to in evidence in this suit in testimony taken respecting the same for the final hearing, the defendants paying you all the expenses attendant on such production, and returning them to you after such testimony has been taken respecting the same?

A. If there is a law compelling me to do so, I will readily, otherwise I will not.

Q. 5. Will you permit your porter, Michael Hasson, who is also now here present in obedience to a *subpœna* to produce or to exhibit on the premises, 242 Water street, New York, said iron patterns to defendant's counsel and his witnesses and expert, that testimony may be introduced in this cause respecting such iron
52 patterns?

A. Had not the leading party of the defendants quite recently tried to bribe said Michael Hasson, my reply might have been different. As it is, I decline to do so.

Q. 6. Who do you refer to in your last answer as the "leading party?"

A. A man *surreptitiously* introduced to me by Mr. Todd as Mr. Rice, after my having told Mr. Todd that I had to turn him out of my rooms, his breath being so strong of liquor at the time as to create nausea and sickness.

Q. 7. Did I not state to you in my office one day, re-
53 ferring to Mr. Rice, "This is Mr. Rice, Miss Shepard." What is there "surreptitious" about that?

A. Because I had already declined having anything to do with the man coming to me in liquor, and told Mr. Todd so.

Q. 8. Referring to your answer to your fourth question, do you mean that you positively decline to produce said patterns, expenses of their production being paid, or to permit the defendants' counsel, defendants, or witnesses to see them, unless the Court orders you to produce them or to permit such parties to see them?

A. I do decline unless a law compels me to do so.
54 Q. 9. Will you not answer this question, yes or no?

A. I do decline unless compelled by law.

Defendant's counsel gives notice to witness that he will apply to his Hon. Judge Benedict at his chambers in the U. S. Court building, No. 168 Montague Street, City of Brooklyn, on Friday, the 19th day of March, 1880, at 4 o'clock P. M. of said day, for an attachment against her for refusing to produce the said iron

patterns; and that such application will be made in the subpoena *duces tecum* this deposition, the witnesses former deposition and the other depositions and proceedings in this cause and in affidavit, the examination of this witness and the other witness Hassen here present is requested to be adjourned to Friday, March 19th, at 4 o'clock P. M., except that before such adjournment the complainant's counsel may cross-examine the witness, since said counsel has so expressed such a desire. 55

Counsel for complainant states that it is entirely indifferent to complainants whether or not the patterns are produced, and that he will not attend upon the motion for attachment of which notice has just been given; he therefor requests that the examination be adjourned to such a time as would render it possible for the above motion to be argued and decided in the meantime.

Cross-examination, de bene esse.

X-Q. 11. Have you not already looked for the patterns referred to in this examination?

Defendant's counsel denies that the former testi- 56
mony has any reference whatever to iron patterns that the witness was only interrogated respecting wooden patterns, some of which she stated had been sent over to her residence; that the witness was simply directed heretofore to look for the heater itself and for wooden patterns; further that the question is immaterial, because Michael Hasson has testified that the witness would not know these iron patterns if she even saw them in the store; further immaterial because Michael Hasson has testified that he believes he could find them if he had authority from the witness to look for them. 57

Counsel for complainant denies that the former testimony referred only to the wooden patterns, and refers particularly to question 117 of the examination of this witness, taken January 19th, 1880, and the answer thereto. Attention is also called to the fact that the witness, Michael Hasson, subsequently stated that even if Miss Shepard gave him permission to search for the

iron patterns that he (Hasson) could never find them, and that any such search would be useless. (See questions 101 and 102 of the examination of Michael Hasson, taken February 14th, 1880).

Defendant's counsel replies that but a portion of Hasson's testimony has been referred to and improperly commented on; that the whole of the testimony will be presented to the Court on the
58 application for the attachment to which it is presumed this cross examination is intended as an opposition; that under these circumstances the Court had better get at the whole of the record.

Counsel for complainant states that the question of the attachment is utterly indifferent to complainants, except so far as it affords an excuse to the defendants for continuing the tactics of delay, which have been carried on persistently for nearly three years and a half since the complainant's *prima facie* case was closed, and that the object of the cross-examination is simply to
59 show that this application is made from the motive of delaying this cause still further.

Defendant's counsel positively and unequivocally denies the statement made by complainants' counsel respecting the alleged tactics of delay, that facts connected with the parties defendant, also with the inaccessability of certain evidence would amply refute any such charge, were they spread here upon the record, but defendant's counsel considers it unnecessary to do so, and therefore requests complainants' counsel to
60 at once proceed with any cross examination which he may have, which is only extended as an act of courtesy intermediate with the application for the attachment as defendant's counsel is not through with the examination of the witness yet on the direct, and cannot close the direct until after the Court has passed upon this question of the attachment.

Counsel for complainant claims that he has the right to cross examine, and is not subject to the courtesy of his opponent.

A. I have all kinds of patterns, both iron and wood.

X-Q. 11. Were you able to find the patterns whether of iron or of wood?

A. I was not after a thorough search.

X-Q 12. Were you assisted by anyone in making that search?

A. Slightly by my clerk.

X-Q. 13. Then do I correctly understand that it is impossible for you to produce the iron patterns called 61
for in the subpoena *duces tecum*, served upon you and now shown you?

A. I cannot produce them.

Counsel for complainant now offers in the evidence subpoena, *duces tecum*, which he has just shown to the witness, and the same he requests to have marked Complainant's Exhibit Shepard's subpoena, B. L. B. Examined March 18th, 1880.

Defendant's counsel has no objection to the subpoena being used in any proper manner in the 62
cause, but since it is the foundation of this examination and the application for the attachment, defendant's counsel do not propose to part possession of it until that proceeding is terminated in the Court and in the U. S. Marshal's office, where it will require to be used in the case of the issuance of a warrant against the witness, therefore it is not proper to make it, at least at the present time, an Exhibit in this cause.

Defendant's counsel, however, has no objection whatever to this process being shown to wit- 63
ness, but will not permit it to go out of his custody to be marked or scribbled upon until after it has fulfilled the object for which it was intended, and defendant's counsel will leave it in the custody of the Examiner until the Court meets to consider the question of the attachment proceedings, but not to be in any way marked or written upon.

Counsel for complainant requests the examiner to mark this subpœna which has been placed in his custody, so that the same may be properly identified.

Defendants' counsel denies that it was so placed in the examiner's custody, except with the qualification stated, and that the Clerk's signature and seal of the Court sufficiently well identifies the process, and that it is now only here for the purpose of having it exhibited to the witness by
64 complainants' counsel if he so elects.

Counsel for complainant requests the Examiner to certify that the subpœna which he showed to the witness is dated March 16, 1880, and requires her to appear before the Examiner, at his office, No. 168 Montague street, Brooklyn, on the 18th of March, 1880, at 12 noon.

I so certify. *Examiner.*

Counsel for complainant asks counsel defendant to admit that the subpœna which he has shown witness is the original subpœna by which he procured the attendance of the witness, Miss Eliza
65 M. Shepard, on this examination.

Defendants' counsel so admits.

X-Q 14. Have you not informed Mr. Todd, the defendant's counsel previously, that you had searched for these iron patterns and had been unable to find the same and could not produce the same?

Objected to as incompetent, improper, and witness's former deposition will show for itself just what the witness testified to, and as asking for mere outside conversations with counsel.

A. Repeatedly.

X-Q 15. Did you so inform him previous to the ser-
66 vice of the subpœna *duces tecum*, requiring you to appear here to-day?

Same objection, and as immaterial.

A. More than once.

ELIZA M. SHEPARD.

Affirmed to before me }
18th March, 1880. }

B. LINCOLN BENEDICT,
Examiner.

Further examination of witnesses adjourned to Friday, March 19, 1880, at 4 P. M., including Michael Hasson.

Friday, March 19, 1880.

Appear—Mr. A. J. Todd for Respondent.

Witnesses—

Eliza Shepard and Michael Hasson.

Further taking of testimony adjourned to Monday March 22, at 9:30 A. M. 67

U. S. CIRCUIT COURT.

Eastern District of New York.

In the matter of
the application for an
attachment of
Eliza M. Shepard.

68

June 9th, 1880.

Benedict, *J.*

This is an application for an attachment against a witness to furnish a contempt in refusing to bring certain patterns for a stove in pursuance of the direction of a writ of *subpœna duces tecum*, issued out of this Court and duly served upon the witness.

The writ was issued as, of course, from the clerk's office and without application to the Court.

On the part of the witness, the point is taken that the Court has no power by a writ of *subpœna duces tecum* to compel a person to bring to Court his property other 69
than documentary evidence, and that the function of a *subpœna duces tecum* is confined to securing the production of documents and books.

The power to issue the writ of subpœna is derived from § 716, and must be found in the words "all writs which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

Is a writ requiring a person not a party to the suit to attend a Court and bring with him certain described patterns of the castings of a stove in order that such patterns may be put in evidence a writ agreeable to the usages and principles of law?

I have been referred to no case in which the authority to compel a person not a party to the suit to attend and bring with him property of this description for such a
70 purpose has been declared, or contended for, nor has it been shown that such a writ was ever before issued. Mr. Starkie speaks of the *subpœna duces tecum* as a writ wholly to compel the production of instruments and documents.

Starkie On Evidence, p. 172.

In Henry *vs.* Long (9 East, p. 473) where the power to issue a subpoena *duces tecum* was called in question, the writ is spoken of as used to compel the production of "written testimony," "written evidence," "documents," "papers belonging to them individually," "books and papers," "specified papers and instru-
71 ments."

The writ now under consideration seems therefore to be a novelty not agreeable to any usage of the law, and therefore not within the power conferred by the statute.

This conclusion is strengthened by reference to §869 of the Revised Statutes, where provision is expressly made for a *duces tecum* to a witness to be examined upon a commission in pursuance of §868, and when the writ is expressly confined to the production of any paper or writing, or written instrument, or book, or other document.

72 Inasmuch as it is evident that §§868 and 869 were intended to authorize the procuring by means of a commission, when necessary, any evidence that might be procured upon a trial in Court, the limitation of these provisions to documenary evidence affords ground for the conclusion that the function of the writ of subpoena *duces tecum* is accurately described in §869.

The provisions of the statute of this State, when the function of the writ of subpoena is limited to requiring

the witness to bring with him "a book or paper" may also be referred to, as showing the usage of the law in this respect.

The motion is denied.

Eastern District of New York, ss.

I, B. LINCOLN BENEDICT, Clerk of the Circuit Court of the United States for the Eastern District of New York, 73
do hereby certify that the foregoing is a true copy of an original decision remaining of record in my office.

In Testimony Whereof, I have caused the Seal of the said Court to be hereunto affixed, at the City of Brooklyn, in the Eastern District of
[L.S.] New York, this 14th day of January, in the year of our Lord one thousand eight hundred and eighty-one and of the Independence of the United States the one hundred and fifth.

B. LINCOLN BENEDICT,
74
Clerk.

Exparte.
JOHN H. BURTIS,
and
JOHN M. GRAFF.

I hereby waive the Rule to show cause why the writ of mandamus should not issue in the above entitled matter. Dated New York January, 22d, 1881.
75

CHARLES L. BENEDICT.

2

SUPREME COURT, U.S.
FILED
JAN 24 1901
JAMES H. McKENNEY, CLERK

In Supreme Court of the United States.

Exparte,

JOHN H. BURTIS

and

JOHN M. GRAFF.

BRIEF FOR PETITIONERS.

I.

The power to issue and enforce a subpœna *duces tecum*, calling for the production of a chattel as evidence, is conferred on the United States Circuit Courts by virtue of Section 716 of the Revised Statutes of the United States.

II.

The mode of making such proof in equity cases is under rules laid down by the Supreme Court of the United States for courts of Equity of the United States, (Sections 862 and 917 of Rev. Stats. of U. S.) and when such rules do not apply the practice is to be regulated by the present practice of the High Court of Chancery in England. (Rule 90 of Equity Rules.)

III.

The practice in the English Courts appears to be a liberal one respecting the production and proof of Exhibits other than writings, books or documents, as the following refferences will show:

> "But to pass on to matters which fall more strictly under the head of inspection, a judge sitting in Equity *will often require to have things brought before his eyes* either publicly or in his private room. Thus he will order an infant to be produced in Court to see that he is living and still a child."
>
> *Gresley on Eq. Ev.* 303 *2nd Ed.*

The cases, however, in which this power of the Court is most actively called into operation are those in which an injunction is applied for, or other proceedings are taken, on an allegation of Piracy, or of the infringement of a patent.

Id. 305.

The word "Exhibits" is often restricted to that kind of writings which may be proved *viva voce* at the hearing; see the following section. But maps, plans, drawing, *models, and even samples of things which are the subjects of litigation, and the things themselves when convenient for inspection, may be proved* and used as Exhibits; as, *e. g.* in any of the many cases of applications for an injunction. And as to inspection in aid of proof, in such cases especially, see, *e. g.*, *Sheriff* v. *Coates*, 1 *Russ.*

& M., 159, *Ex-parte Fox* 1, *V. & B.*, 67 ; and the other cases referred to *infra*, Pt. III, ch. 2.

Id. 101 (note *a.*)

Armorial bearings are also evidence on a question of pedigree. Some officer from the Herald's College *must attend to explain the intention and effect of the different bearings.*

Starkie on Ev., 9th Ed., 283.

IV.

The fact that the witness subpœnaed is not a party to the suit is immaterial.

V.

There is virtually no question respecting the existence of the iron paterns among the effects over which the Executrix has assumed control.

See affidavit of Rice, p. 8, fol. 23 ;
" " Hart, p. 9, fol. 25 ;
" " Low, p. 10, fol. 28 ;
" " Dunn, p. 11, fol. 31.

It is true Hasson says in his affidavit (p. 13, fol. 37,) that the Saracenic grate or heater is not on the premises ; *but he does not say that the iron paterns are not there.*

Eliza A. Shepard, the executrix and witness subpœnæd, says, at p. 18, fol. 51, *that if there is a law compelling her to produce the iron paterns she will readily*, otherwise not.

It is true she says, page 21, fol. 60, that *she* has searched for them and cannot find them ; *but it is not*